(14)

No. 05-5966

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

ERIC MICHAEL CLARK,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals

PETITIONER'S OPENING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the state's evidence on the element of *mens rea* violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?

(2) Whether Arizona's insanity law, as set forth in A.R.S. § 13-502 (1996) and applied in this case, violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption of this matter.

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OPINIONS BELOW

The Arizona Court of Appeals' decision affirming Petitioner Eric Clark's conviction and sentence is unpublished. *State v. Clark*, No. 1 CA-CR 03-0851 and 1 CA 03-0985 (consolidated) (Ariz. App., Div. 1, January 25, 2005.) (JA 336-54.) The Arizona Supreme Court's order denying discretionary review (JA 355) is also unpublished. *State v. Clark*, No. CR 05-0047 PR (Ariz., May 25, 2005).

JURISDICTION

The petition for *certiorari* was filed on August 17, 2005 and granted on December 5, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV provides in pertinent part:

> . . . [N]or . . . shall any state deprive any person of life, liberty, or property, without due process of law . . .

Section 13-1105(A)(3) of the Arizona Revised Statutes (1996) provides in pertinent part that a person commits first-degree murder if:

> Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.

Section 13-502(A) of the Arizona Revised Statutes (1996) provides in pertinent part:

> A. A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. . . .

STATEMENT OF THE CASE

On June 21, 2000, 17-year-old Eric Clark shot and killed Flagstaff Police Officer Jeffrey Moritz. Eric was charged with first-degree murder under A.R.S. § 13-1105(A). The Indictment alleged that he "intentionally or knowingly" caused the death of a police officer while in the line of duty. (ROA-Doc 3.) After a bench trial, the Superior Court convicted him of this offense and found that he had not carried his burden of proving that he was "guilty except insane" under ARS § 13-502. (JA 331-35.) (The trial was conducted in two phases, the first to determine guilt or innocence, the second to determine sanity. The court's findings on both issues were made at the conclusion of the entire trial.) The Arizona Court of Appeals affirmed Eric's conviction and resulting sentence of life imprisonment, finding the prosecution's evidence sufficient to "support the conclusion that . . . [he] knowingly and intentionally shot Moritz and knew that he was a police officer when he did so" (JA 342) and that Eric "did not prove by clear and convincing evidence that he was insane pursuant to ARS § 13-502(A) at the time of the crime"

(JA 347). After the Arizona Supreme Court denied discretionary review (JA 355), this Court granted *certiorari*.

A. The Facts

The tragic shooting death of Officer Moritz occurred at 4:51 a.m. He had responded in uniform in his marked patrol car as a result of 911 calls from a residential neighborhood complaining that a vehicle was continuously driving around the block blaring loud music. The officer located the vehicle (a pickup truck) and stopped it after activating his emergency lights. About a minute after the officer left the patrol vehicle there was an exchange of gunfire. Officer Moritz was struck by a bullet that impaired two of the four major blood vessels serving his brain and killed him. (JA 338-39.)

There was no dispute at trial that Eric Clark was the driver of the pickup truck and the person who shot Officer Moritz. There was also no dispute that at the time of the episode Eric was suffering from chronic paranoid schizophrenia[1] and was actively psychotic[2]. The prosecution

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[1] "Schizophrenia is an extremely serious psychosis that is characterized by grossly distorted perceptions of reality, a withdrawal from social interaction, and a fragmentation of perceptions, thought, and reality." *Sanders v. State*, 585 A.2d 117, n. 2 (Del.Super. 1990) *citing* J. Coleman, J. Butcher & R. Carson, ABNORMAL PSYCHOLOGY AND MODERN LIFE 395 (6th ed. 1980). "Hallucinations, delusions, nonsensical speech, violent or self-destructive behavior, and a loss of motor control are all common symptoms." *Id. citing* Day & Semard, SCHIZOPHRENIC REACTIONS, THE HARVARD GUIDE TO MODERN PSYCHIATRY 199, 210-13 (A. Nicholi ed. 1978).

[2] "[P]sychosis is a general term that describes an individual who has gross disturbance in their reality testing and usually, that's manifested by a combination of delusions and hallucinations." (RT 8/22/03 at 17-18; JA 15.)

conceded these facts (RT 8/27/03 at 33-34, 39, 48, 58/JA 302-03, 306, 313, 330-31); and the prosecution's expert forensic psychologist diagnosed it independently of, but in conformity with, the defense expert psychiatrist (RT 8/26/03 at 39, 35, 38, 89-91, 94, 133, 163-64, 172-74/JA 132-33, 135-36, 179-81, 184, 219-20, 246-47, 254-57). The trial judge found that:

> "Both experts, all lay witnesses, and the attorneys agree that the Defendant suffers from a qualifying mental disease: paranoid schizophrenia. The Defendant clearly began suffering from this illness well before June 21, 2000 and suffered from the illness at the time of shooting Officer Moritz." (JA 332)

The Arizona Court of Appeals concurred (JA 345).

Until about a year and a half before the shooting, Eric had been a healthy, well-adjusted teenager who got good grades, excelled in sports, was popular and had no significant problems at school or at home.[3] After his illness struck he began to have inexplicable mood swings and episodes where with a strange look in his eyes he screamed, or whispered audible gibberish.[4] His alarmed parents eventually had him arrested, taken to a juvenile facility and transferred to a psychiatric hospital. He was later released against medical advice.[5] He developed the belief that he was being poisoned, and that "They" were

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[3] See, *e.g.*, RT 8/20/03 at 9-11, 53-56, 61, 87-89, 133-34, 165-66, 180, 195, 214-15.

[4] See, *e.g.*, RT 8/20/03 at 15, 17, 91-97, 113, 115, 182-86, 197; Day 8, pp. 16-17.

[5] See, *e.g.*, RT 8/20/03 at 97-100, 143-45, 202-08.

"after him."[6] He would not sleep in his bedroom but retreated into the small computer room in his home, where he tied up a fishing line with beads and wind chimes to alert him to intrusion by invaders.[7] He later returned to his room but equipped it with the same alarm apparatus.[8] He began to leave the TV on all the time, "loud," and he turned up the car radio "real loud."[9]

Teachers and friends began to talk about his numerous episodes of bizarre behavior;[10] he became a friendless loner;[11] his vocabulary and even his physical appearance noticeably changed.[12] He began to reveal his belief that the Earth had been invaded by aliens, that Flagstaff was populated by aliens, that the aliens were trying to capture

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[6] See, *e.g.*, RT 8/20/03 at 29, 101, 116, 135, 209, 210; RT 8/22/03 at 33, 38-39/JA 27-28, 31-32; RT 8/26/03 at 166, 170/JA 24-50, 253.

[7] See, *e.g.*, RT 8/20/03 at 100-01, 211.

[8] See, *e.g.*, RT 8/21/03 at 6: "[W]hen he moved back into his bedroom, he had taken eye hooks and screwed them in the walls, crisscrossed all around his room, and had taken fishing line and had strung fishing line crisscrossing all around his room through the eye hooks, and then had taken craft beads and strung the craft beads strategically on various points along this fishing line. He had taken beverage glasses from the kitchen, and when he closed the door to his room, would stack the beverage glasses . . . in front of the door if you were inside the room, and along the window sill so that if you opened the door, he had – he also had wind chimes on this string, the wind chimes would ring, the beads would move, the glasses would fall. . . ." See also RT 8/22/03 at 40/JA 33; RT 8/26/03 at 18, 166-67/JA 118-19, 249-50.

[9] See, *e.g.*, RT 8/20/03 at 65, 92, 124; RT 8/22/03 at 39/JA 32-33.

[10] See, *e.g.*, RT 8/20/03 at 23, 27-28, 177, 219-20.

[11] See, *e.g.*, RT 8/20/03 at 61-62, 166-67, 182-83, 214-15; RT 8/21/03 at 68-69.

[12] See, *e.g.*, RT 8/20/03 at 62-64, 166-67; RT 8/21/03 at 68-69.

and kill him, and that even his parents were aliens.[13] His fear that the aliens would poison him was such that he would not eat anything at home except food from sealed packages. He started going to the Sizzler to eat because he thought he would be safe from poisoning where the general public ate.[14]

For months prior to the shooting of Officer Moritz, Eric's parents tried to have him recommitted. His mother repeatedly consulted a lawyer in efforts to have the county attorney press charges so that he would be forced into mental health counseling.[15] During the two days before the shooting Eric's parents called at least five facilities and twice contacted the lawyer's office, "frantic, basically, and said I had to see you that day and Eric was deteriorating so fast that I had to figure out a way to get him some help."[16] The prosecution's expert witness testified at trial that, had it not been for the shooting and its aftermath,

> "I think his family probably would have been able to keep him at a higher level of functioning. They probably would have gotten the courts involved. The courts probably would have had him institutionalized against his wishes because he was a danger to himself. And, hopefully, some

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[13] See, *e.g.*, RT 8/20/03 at 110-12, 131-32, 136, 226-27; RT 8/22/03 at 25, 29, 32, 38-39, 47-48, 55, 72-73/JA 21, 24, 26-27, 31-32, 38-40, 45, 60-61; RT 8/26/03 at 19-21, 103-09, 136-37, 142, 166-70, 172-73, 179-80/JA 119-21, 192-97, 222-23, 227-28, 249-53, 255-56, 261-62.

[14] See, *e.g.*, RT 8/20/03 at 101, 107-08, 130; RT 8/26/03 at 136-37, 158/JA 222-23, 242.

[15] See, *e.g.*, RT 8/20/03 at 221-25, 232-34.

[16] RT 8/20/03 at 225-26. Regarding the calls to the medical facilities, see the discussion of the phone records (id. at 232-34).

> higher level of functioning could have been preserved." (RT 8/26/03 at 201/JA 280.)

Instead, Eric shot and killed Officer Moritz in the early morning of June 21, 2000.

B. The Proceedings Below

Eric was initially found incompetent to stand trial, civilly committed, and was hospitalized for nearly three years before his competency was restored.[17] When the prosecution resumed, Eric's attorneys sought to present evidence of his mental illness for two purposes: (1) to cast doubt on the prosecution's proof that Eric intentionally or knowingly killed a police officer (ROA-Doc 362; RT 8/5/03 at 16-18); and (2) to establish the affirmative defense of insanity ("Guilty Except Insane" [hereafter, "GEI"]) under ARS § 13-502. (ROA-Doc 257; RT 8/5/03 at 16-18). The

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[17] Immediately after Eric's arrest he was determined in separate mental-health proceedings (before a different trial judge) to be suffering from psychosis and paranoid schizophrenia and therefore gravely disabled and a danger to himself and others. As a result of that proceeding (pursuant to Title 36 of the Arizona Revised Statutes), he was committed to the Arizona State Hospital for treatment. (Cause MH 2000-0080, RT 9/19/00 at 124-27.) He was also determined by the trial judge, in separate proceedings pursuant to Rule 11 of the Arizona Rules of Criminal Procedure, to be incompetent to stand trial and was further committed to the Arizona State Hospital for treatment and restoration to competency – a course of treatment that took almost three years. (ROA-Docs 16, 18, 156-57, 253; RT 3/28/01 at 2-6; RT 8/8/01 at 2-3; RT 6/26/02, 7/10/02, 7/11/02.) Ultimately, he was determined to be competent and was tried to the court without a jury. (ROA-Docs 304-05; RT 5/8/03 at 2-3; RT 7/28/03 at 2-11.) The parties stipulated that the court could consider all previous mental-health testimony including that before the court in the competency and Title 36 proceedings, all of which were part of the record on direct appeal. (See, ROA-Doc 358; Arizona Court of Appeals Order dated 1/28/04.)

trial court requested briefing by the parties of the legal issues raised by the potential use of Eric's mental-illness evidence. (ROA-Doc 373.)

The prosecution informed the court that in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997), the Arizona Supreme Court had "held that the insanity test is the sole standard for criminal responsibility in Arizona" and "specifically rejected the argument that evidence of diminished capacity could be presented to negate intent or knowledge." (ROA-Doc 376 at 2.) The government asserted that "[i]n the instant case, defendant is attempting to present evidence of his purported delusions to negate the mental state of intending or knowing required under ARS § 13-1105(A)(3) . . . [and s]uch evidence would be that of diminished capacity which is not permissible under Arizona law." (Id. at 3.) It added that "*Mott* further held that the Federal Constitution was not violated by the exclusion of diminished capacity evidence." (Id.)[18] Defense

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[18] *Mott* involved a defendant's contention that in a prosecution for child abuse and felony first-degree murder, that she was entitled to present "expert psychological testimony that as a battered woman, she was unable to form the requisite mental state necessary for the commission of the charged offenses." (187 Ariz. at 538, 931 P.2d at 1048.) An intermediate state appellate court had sustained this contention, "finding that the trial court's preclusion of defendant's proffered testimony regarding battered-woman syndrome violated due process." (187 Ariz. at 539, 931 P.2d at 1049.) The Arizona Supreme Court recognized that Mott's evidence of her "history of being battered and of her limited intellectual ability was not offered as a defense to excuse her crimes but rather as evidence to negate the *mens rea* element of the crime." (187 Ariz. at 540, 931 P.2d at 1050.) It held that Arizona criminal defendants are not permitted to present "'*diminished capacity*'" evidence of this kind because the Arizona legislature's enactment of an insanity defense with a particular definition of exculpatory insanity – together with the legislature's failure to enact a provision of the Model Penal Code which explicitly authorized a

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counsel's response was that, notwithstanding the *Mott* decision, the GEI statute and *Mott* prohibition violated Eric's rights to present a complete defense and he was preserving for appeal the contention that these limitations violated his state and federal constitutional Due Process rights. (ROA-Doc 374 at 2-3.) After considering these submissions, the trial judge announced that:

> (1) the court was bound by *Mott* to consider Eric's mental-illness evidence only insofar as it bore upon the issue of whether Eric was GEI under ARS § 13-502 and not for any other purpose;
>
> (2) the court would receive any mental-health evidence that Eric's lawyers wished to present, since (a) most or all of the same evidence forbidden by *Mott* was also relevant to the GEI defense, and (b) since the judge was the fact finder he could separate proper from improper uses of the evidence avoiding prejudice to the prosecution;
>
> (3) the court would allow the defense to make additional evidentiary offers of proof at the end of the trial; and
>
> (4) all evidence proffered during trial would be preserved for any challenge to *Mott* or the trial judge's reading of *Mott* on appeal.[19]

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defendant's proof of mental disorder to prove that s/he did not have a mental state that is an element of an offense (see note 29 *infra*) – manifested an intent to preclude such evidence (187 Ariz. at 540-41, 931 P.2d at 1050-51), and that the preclusion does not violate defendants' federal Due Process rights (187 Ariz. at 541-42, 931 P.2d at 1051-52).

[19] See RT 8/18/03 at 5-6/JA 6-7:

"THE COURT: What I have intended or what I'm going to do after reading all the Mott case is – and recognizing that

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Under Arizona law the standard for determining whether a defendant is insane is whether s/he is afflicted by a qualifying illness and as a result "did not know the criminal act was wrong." ARS § 13-502(A). Applying this standard to the evidence,[20] the trial judge found that Eric was guilty of first-degree murder as charged since he had not proven his affirmative defense of GEI. (ROA-Doc 392/ JA 331-35.) By a post-trial motion to vacate, Eric renewed his federal Due Process challenges to the narrowness of the GEI standard (ROA-Doc 406 at 5-7), and to the refusal

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> much of the evidence that you're going to be submitting, in fact all of it, as far as I know, . . . that has to do with the insanity could also arguably be made along the lines of the Mott issues as to form and [sic] intent and his capacity for the intent. I'm going to let you go ahead and get all that stuff in because it goes to the insanity issue and because we're not in front of a jury. At the end, I'll let you make an offer of proof as to the intent, the Mott issues, but I still think the supreme court decision is the law of the land in this state. . . . I will certainly allow you to preserve the issue; you can argue or not argue, but you can make an offer of proof at the conclusion of the case, but I don't think it's the law of the land at this point. And then at least that preserves it on appeal if something happens later on down the road. But right now I'm bound by the supreme court decision in Mott and we will be focusing, as far as I'm concerned, strictly on the insanity defense."

[20] Portions of the evidence are quoted or summarized later in this brief in connection with the specific issues to which they are relevant. Because the evidence presented at the trial and the other materials in the record (see note 17 *supra*) were sufficient to frame the issues for appellate review court on the limited factual issues the trial court held it could consider under ARS § 13-502 and *Mott*, defense counsel made no additional "offer of proof" (see note 19 *supra*) at the conclusion of the case but preserved Eric's legal contentions by asking the court to consider all of the evidence presented in determining whether the state had proved its case and also by filing a motion to vacate judgment and sentence that cited the federal constitutional authorities and precedents. (RT 8/27/03 at 4-6; ROA-Doc 406 at 5-10.)

of the trial judge to consider his evidence of mental illness in deciding whether the prosecution had proved the *mens rea* elements of first-degree murder (Id. at 7-10). He raised the same federal contentions on appeal, and the Arizona Court of Appeals rejected them on the merits. (JA 347-50, 351-53.)

SUMMARY OF THE ARGUMENT

I.A. Putting broader issues aside, the manner in which Arizona's rules governing the consideration of a criminal defendant's evidence of mental illness were applied at Eric Clark's trial to deny him any semblance of a fair proceeding. The prosecution was permitted to prove mental elements of the offense by urging that they could be inferred from Eric's behavior, while Eric was not permitted to contest those factual inferences by urging that his mental illness provided alternative explanations for the same behavior. This was a violation of his Due Process right to dispute the prosecution's case in an adversarial trial of the facts.

I.B. Even if the prosecution had not proved inferentially the mental elements of the crime charged, Eric could not fairly be precluded from relying upon evidence of his severe mental illness to cast doubt upon the prosecution's proof of *mens rea*. If a State makes certain conduct criminal only when it is performed with a specific state of mind, it cannot deny defendants the right to argue to a trier of fact that their mental impairments prevented them from actually, subjectively having the culpable state of mind. Categorical exclusion of reliable mental-health evidence pertinent to statutorily defined *mens rea* issues cannot

plausibly be justified as a redefinition of the crimes rendering those issues irrelevant. It is instead an arbitrary exclusionary rule of evidence that interferes with defendants' rights to present a complete defense, and offends *procedural* Due Process.

I.C. If viewed alternatively as a substantive redefinition of all the *mens rea* elements in a State's criminal code, this type of categorical exclusionary rule would be so irrational as to violate *substantive* Due Process. A state cannot consistent with Due Process define crimes as a physical act committed by a normal person if (but only if) s/he has a culpable state of mind and simultaneously punish acts committed by a psychotic person lacking any coherent state of mind. Such a criminal regulation that punishes the mentally ill without the requisite *mens rea* is abhorrent to traditional, fundamental Anglo-American principles of ordered liberty.

II. Historical and contemporary notions of the necessary conditions for just criminal punishment also restrict a State's power to abrogate the core features of the immemorial insanity defense recognized in the Anglo-American tradition and reflective of the principle that our culture does not impose serious criminal liability in the absence of *some* degree of fault. To punish people who are too sick to know what they are doing represents an unacceptable break with that tradition. Arizona's abolishment of a significant aspect of the deeply rooted *M'Naghten* test violates Due Process.

III. Arizona has *both* cut the core out of the historical Anglo-American insanity defense *and simultaneously* denied defendants the ability to counter the prosecution's proof of *mens rea* with evidence of mental illness. This

combination of exclusionary rules goes beyond all reasonable Due Process bounds.

ARGUMENT

I. ERIC WAS DENIED DUE PROCESS WHEN THE TRIAL COURT REFUSED TO CONSIDER EVIDENCE OF HIS SEVERE MENTAL ILLNESS IN DETERMINING FACTUALLY WHETHER THE PROSECUTION PROVED THE MENTAL ELEMENTS OF THE CRIME CHARGED

A. Foreclosing Eric from Refuting the Inferences on Which the Prosecution Relied to Prove the Mental States at Issue Violated His Due Process Right to Contest Guilt at a Fair Trial of the Facts.

The following two subsections of this brief explain why Arizona's prohibition of "diminished capacity" evidence by criminal defendants violates both procedural and substantive Due Process. However, the Court need not reach those issues to decide the present case. Here, the prosecution was permitted to argue to the trier of fact that mental states which were necessary elements of the crime charged against Eric Clark could be inferred *factually* from Eric's behavior; and then Arizona law was applied *to preclude Eric from contending that those factual inferences should not be drawn* because the behavior was explainable, instead, as a manifestation of his chronic paranoid schizophrenia. Such an extension of the Arizona ban plainly denied Eric "'the right to present a defense, [–] the right to present the defendant's version of the facts as well as the prosecution's to the . . . [trier] so it may decide where the truth lies . . . [– which] is a fundamental element of due

process of law.'" *Webb v. Texas*, 409 U.S. 95, 98 (1972), quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967); see, *e.g.*, *In re Oliver*, 333 U.S. 257, 273 (1948); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Goss v. Lopez*, 419 U.S. 565, 579 (1975), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Baldwin v. Hale*, 1 Wall. (68 U.S.) 223, 233 (1863).

The first-degree murder charge against Eric was based exclusively on ARS § 13-1105(A)(3), which defines the crime as the act of causing the death of a law enforcement officer in the line of duty, "[i]ntending or knowing that . . . [one's] conduct will cause death to a law enforcement officer." The prosecution undertook to prove that Eric knew that Officer Moritz was a police officer through several lines of factual inference. One stressed by the prosecutor in his opening and closing arguments was an "ambush" theory – that by driving 22 times around a block in a residential neighborhood before dawn with the truck radio blaring, Eric was "luring" police to the scene so that he could kill an officer who responded to the inevitable calls of disturbed residents.[21] A second line of inference,

[21] *Opening Statement by Prosecuting Attorney Powell*:

"At approximately 4:30 a.m. police dispatch began receiving 9-1-1 calls from the University Heights area. The calls were complaining of a vehicle which was continuously driving around University Heights area with extremely loud music playing. Some people complained that it had been going on for approximately an hour. Some people complained that it had been doing laps. One person who will testify even testified that he counted the vehicle going around in a lap 22 times." (RT 8/5/03 at 15.)

" . . . [H]e lured Officer Moritz to him, by driving around in circles for a minimum of 22 times, and got out of his car, and the ambush was on and Jeff Moritz was killed." (Id.)

(Continued on following page)

asserted by the prosecutor to both strengthen and complement the first line, was that Eric had made statements on occasions prior to the crime indicating that he was angry with police officers and wanted to kill one.[22] Both of these lines of factual inference were cited by the trial judge in support of his finding that Eric was guilty of the crime charged.[23] Both inferences were cited by the Arizona

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Closing Statement by Prosecuting Attorney Powell:

> "We know all of the facts of him driving around from sometime [sic] probably before 4:00 a.m. . . . until at least 4:50 when Officer Moritz is killed. We know he's blasting the music. He does the route in that one area of University Heights 22 times. . . . Officer Moritz comes up. . . . We know he exited the vehicle. . . . We know he's ambushed." (RT 8/27/03 at 50/JA 314-15.)

[22] *Opening Statement by Prosecuting Attorney Powell*:

> "And I'd like to leave the Court with one final thought. One – approximately one week before this incident, this murder, the defendant walked up to some individuals at a place called Thorpe Park. . . . The defendant walked up and made some unusual comments to them. You'll hear from two of these individuals this week. His comment was, I think it would be – something to the affect [sic] of, I think it would be cool if I went up on the hill and fired my .22 handgun – and please remember, Officer Moritz was killed with a .22 handgun – fired it into the air until the police came and I would taunt them until they came for me and then as they came for me, I would shoot them in the head with a .22 rifle. That's what he said one week before he lured Officer Moritz to him. . . ." (RT 8/5/03 at 15.)

Closing Statement by Prosecuting Attorney Powell:

> "[immediately following the passage quoted in the preceding footnote, about Eric's doing the route "22 times" while "blasting the music"] And it makes me think back to Thorpe Park, Judge, just what he said he was going to do, he was going to taunt the police officer and he was going to kill him with his .22." (RT 8/27/03 at 50/JA 314-15.)

[23] "The Court considered the following evidence:

> "• Defendant's statements at Thorpe Park to Jason Tackett and Mark Fields;

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Court of Appeals in its decision upholding the sufficiency of the evidence to support the conviction.[24]

In the case of a mentally unimpaired person, the inferences urged by the prosecution and drawn by the courts below would be very strong, perhaps compelling. But Eric presented mental-illness evidence that might well have rendered those inferences unpersuasive – and certainly unpersuasive beyond a reasonable doubt – if the trial judge had not viewed himself as bound by *Mott* to decline to consider the evidence for this purpose.

- Defendant's actions in driving through a residential area early in the morning with loud music to attract law enforcement. . . .
- . . . . . .

From all of this the Court must conclude that, while the Defendant was affected by his mental illness, it did not, pursuant to the requirements of the statute, distort his perception of reality so severely that he did not know his actions were wrong. Accordingly, the Court finds the Defendant guilty of the First Degree Murder of Officer Jeff Mortiz [sic]."

(Special Verdict at 4-5/JA 333-34.)

[24] "Clark maintains that there was insufficient evidence to support his conviction for first degree murder of a police officer. He rests this argument on his claim that the state presented only circumstantial evidence to show that he (1) intentionally or knowingly caused a death and/or (2) that he intended or knew that he was killing a police officer. . . .

"The evidence at trial established that Clark was angry with police officers and fantasized about ways to retaliate or 'show them,' suggesting a motive for his actions. It also showed that, in driving the pickup truck with its radio blaring, Clark had engaged in behavior that would attract law enforcement to the neighborhood. Clark was playing a 'rap CD' at the time that contained 'many antisocial attitudes' and included lyrics expressing violent attitudes toward police officers. . . .

" . . . All of this is sufficient evidence to support the inference that Clark intentionally or knowingly shot Moritz." (JA 341-44.)

The defense psychiatric expert testified that Eric was suffering from paranoid schizophrenia at the time of the crime (RT 8/22/03 at 36-38/JA 29-32); that paranoid schizophrenics experience auditory hallucinations; and that they are known to turn up the volume on radios and TV's in "an attempt to drown out the voices that they are experiencing" (Id. at 39/JA 32.) The prosecution expert also "diagnosed . . . [Eric] to have schizophrenia, paranoid type." (RT 8/26/03 at 38/JA 136; *see also*, e.g., Id. at 35, 89-91, 94, 133, 163-64, 172-74/JA 132-33, 179-82, 184, 219-20, 246-47, 254-57.) He stressed on redirect that no one knows "what was going through the defendant's head at the time of the murder" (Id. at 175/JA 257); and gave the following testimony on cross:

> "Q. We know that he was delusional as he drove around and listened to this loud, pounding music?
>
> A. His delusions were present then, yes.
>
> Q. Yeah. Do you think that was for the purpose of drowning out voices in his head?
>
> A. That's one theory. Well, actually, that was the theory that was – I think his mother expressed about why he kept the television so loud.
>
> Q. And your experience with schizophrenics are, they often turn up TV's loud, radios loud to drown out the voices?

A. I have encountered that." (Id. at 170/JA 253.)[25]

Accordingly, defense counsel argued in closing that "Dr. Morenz, Dr. Moran testified, many schizophrenics use volume to turn [sic] out the voices. . . . Judge, its pretty apparent Eric was doing just that, especially when you look at this overall." (RT 8/27/03 at 23/J.A. 295.) But under the trial judge's view of *Mott*, he could not consider this evidence and argument as a basis for rejecting the prosecution's contention that the intent to ambush Officer Moritz could be inferred from Eric's blaring CD player.

The defense expert also addressed the plausibility of inferring that Eric had the requisite *mens rea* for conviction via the prosecution's proposed "ambush" motive based

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[25] On redirect examination by the prosecutor, the prosecution expert gave this testimony:

"Q. . . . I think at one point you had said you didn't think the circling behavior in the neighborhood of University Heights was prefatory conduct. Do you agree with that today?

A. Yes. I think that I wouldn't agree with that. I think that the theory that has the most support in my mind is that he enticed the cop and so he was provoking a police action. As I have said before, the alternative theory is that he was in a paranoid state and so forth. *We don't know which of these two is true*, but my position is, it's more likely and more probable that he intended to shoot the cop." (Id. at 191/JA 272) (emphasis added).

Of course, had this testimony been considered by the trial judge on the issue of Eric's intent, it would have had to be evaluated under a burden-of-proof rule requiring the prosecution to eliminate any reasonable doubt regarding this choice of "theory," not under the burden-of-proof rule applicable to the issue of insanity under Arizona law – the only issue for which the trial judge considered the mental-illness evidence – a rule requiring that the defendant prove insanity by clear and convincing evidence.

on evidence of Eric's prior statements about taunting and shooting a police officer.

"Q. . . . Do you think based on, again, your training and experience as a psychiatrist, that Eric was in any way trying to – preparing or trying to create an ambush to kill this police officer?

A. I can't imagine that.

Q. Why not?

A. Eric's behaviors were just – there wasn't much purpose or, you know, didn't seem there was much rhyme or reason to his behaviors. You know, he was continually a surprise to his parents. They didn't know what he was going to do next, which is what they were so concerned about and why they wanted him in the hospital, you know, he wasn't functioning in school, you know, he really wasn't functioning at all.

To hypothesize that he was sort of planning, you know, kind of a scheme to lure police I think is a bit of a stretch. I have trouble imagining that. . . ." (RT 8/22/03 at 46-47/JA 37-39.)

"Q. . . . Based on your experience and your review of the evidence, was Eric even at that time [referring to the time of Eric's weeks-old statements which the prosecution urged and the trial judge found supported an "ambush" theory] capable in your mind of planning several weeks in advance what was going to happen?

A. Oh, no." (Id. at 112/JA 95.)

But again the trial judge's view of *Mott*, while allowing him to infer an "ambush" motive (and therefore intent and knowledge) from Eric's prior statements, precluded him from considering whether Eric's mental illness cast a reasonable doubt upon that inference.

A trial of factual issues crucial to the determination of guilt or innocence under a State's criminal law cannot be conducted in such a fashion without violating the first principles of due process. This Court has held time and again that when the prosecution at a criminal trial asks the trier to infer facts on which its case depends, the defendant cannot constitutionally be foreclosed from responding with evidence and argument that *factually* throws the inference into doubt. *Kelly v. South Carolina*, 534 U.S. 246, 248, 252 (2002); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Rock v. Arkansas*, 483 U.S. 44, 51-55 (1987); *Crane v. Kentucky*, 476 U.S. 683, 689-91 (1986); *Skipper v. South Carolina*, 476 U.S. 1, 5 n. 1 (1986); *and see, e.g., Ake v. Oklahoma*, 470 U.S. 68, 76, 80, 83-84 (1985); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality opinion); *Wardius v. Oregon*, 412 U.S. 470, 474-76 (1973); *Specht v. Patterson*, 386 U.S. 605, 610 (1967).

The several prevailing opinions in *Simmons v. South Carolina*, 512 U.S. 154 (1994), sufficiently exemplify the principle – although in the context of a capital sentencing trial rather than a guilt trial. There, Justice Blackmun's lead opinion found it elementary that:

> "if the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses

> to society. Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." (*Id.* at 168-169.)

Justice Ginsburg explained that when the prosecution makes a factual argument central to its case, "the defendant's right to be heard means that he must be afforded an opportunity to rebut the argument." (*Id.* at 174.) And Justice O'Connor, concurring for herself and Justice Kennedy and Chief Justice Rehnquist, added that "one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him." (*Id.* at 175.)

Any of these axiomatic statements of Due Process law provides a sufficient basis for deciding Eric Clark's case on the present record. To do other than reverse his conviction would set them all at naught.

B. The *Mott* Rule Prohibiting Consideration of Evidence of Mental Illness on the Issue of *Mens Rea* Unconstitutionally Excludes Probative Exculpatory Evidence. Foreclosing Eric from Demonstrating Factually that He Did Not – Because He Could Not – Possess the Mental States Which Were Elements of the Crime Charged Denied Him the Right to Present a Defense Basic to Procedural Due Process.

Even had the prosecution not affirmatively sought and obtained Eric's conviction on the basis of factual inferences regarding his state of mind, that he was denied the opportunity to refute, the trial court's refusal to consider his

mental-illness evidence as bearing on the statutorily defined mental elements of the crime for which he was on trial violated procedural Due Process. The trial court's refusal to consider Eric's mental-illness evidence as bearing on the statutorily defined mental elements of the crime for which he was on trial violated procedural Due Process because "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, . . . [420 U.S. 284 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, . . . (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), quoting *Trombetta v. California*, 467 U.S. 479, 485 (1984). This right includes the opportunity to contest the existence of any fact that must be found by the trier in order to convict. See, *e.g.*, *Rock v. Arkansas*, 483 U.S. 44 (1987); *Olden v. Kentucky*, 488 U.S. 227 (1988).

Here, the trial court held that under the *Mott* rule it was obliged to *find as a fact that Eric knew he was shooting a police officer to death* – a necessary factual element of the only form of first degree murder charged against Eric – while simultaneously *refusing to consider Eric's evidence that an acute episode of his chronic paranoid schizophrenic illness prevented him from actually having that knowledge*. In this situation, the "question of characterization" that Justice Ginsburg described as dividing the Court in *Montana v. Egelhoff*, 518 U.S. 37, 56-57 (1996), vanishes. The *Mott* rule can only be characterized as "a rule designed to keep out 'relevant exculpatory evidence'"[26]

[26] Petitioner concedes that the right to present exculpatory evidence is not absolute. *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996).

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(*id.* at 57 [Justice Ginsburg quoting Justice O'Connor's dissenting opinion for four Justices *id.* at 67]) and therefore one that "offends due process." (*id.* at 57)

The *Mott* Rule cannot be saved on the theory that it constitutes "a redefinition of the mental-state element of the offense" (*id.*). A majority of this Court could plausibly conclude that the Montana legislature in *Egelhoff* had essentially enacted alternative substantive criminal provisions punishing anyone who either (1) purposely or knowingly kills another person when sober or (2) voluntarily gets so drunk that s/he is capable of killing another person without knowing it. (See, 518 U.S. at 57-58.) However, no one could plausibly attribute to the Arizona legislature an intention to create alternative substantive offenses punishing equally (1) a mentally sound individual who kills an on-duty police officer if (but only if) s/he does so intentionally or knowingly, and (2) a mentally ill person who is involuntarily bereft of the cognitive ability to understand that the death of an on-duty police officer will be the consequence of his or her actions.[27] Plainly, the *Mott* ban on mental-illness evidence is not based on such a

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However, exclusion of exculpatory evidence is unconstitutional where it has "infringed on the weighty interest of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986). As discussed herein (see Note 18, *supra* and Note 29 *infra* with accompanying text) Arizona has advanced no valid reason for precluding consideration of this type of probative exculpatory evidence.

[27] We will demonstrate in the following subsection that a substantive criminal statute treating these two situations as involving equivalent culpability would be so irrational and historically aberrant as to violate substantive due process.

bizarre substantive equation.[28] If it reflects anything other than the *Mott* majority's mechanistic application of the *expressio-unius/exclusio-alterius* maxim to Arizona's criminal code,[29] it must be grounded on the notion that mental-illness evidence, as a class, is too beguiling or too controversial to permit it to be used in the way that any other sort of evidence of ignorance or mistake could be

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[28] As Justice Souter wrote for four members of the Court in *Schad v. Arizona*, 501 U.S. 624, 643 (1991), "[i]f . . . two mental states are supposed to be equivalent means to satisfy the *mens rea* element of a single offense, they must reasonably reflect notions of equivalent blameworthiness or culpability. . . ."

[29] The *Mott* court's explicit rationale for holding that "expert testimony regarding a defendant's mental capacity is [not] admissible to challenge the requisite mental state of a challenged crime" (187 Ariz. at 544, 931 P.2d at 1054) was (1) that "Arizona's criminal code was based on the Model Penal Code" (187 Ariz. at 540, 931 P.2d at 1050) but did not include § 4.02(1) the provision that "allowed the admission of '[e]vidence that the defendant suffered from a mental disease or defect . . . whenever it [wa]s relevant to prove that the defendant did or did not have a state of mind that is an element of the offense'" (*id.*); (2) that "[t]he legislature's decision not to adopt this section of the Model Penal Code evidences its rejection of the use of psychological testimony to challenge the *mens rea* element of a crime" (*id.*); and (3) that "[b]ecause the legislature has not provided for a diminished capacity defense, we have since consistently refuse to allow psychiatric evidence to negate specific intent" (187 Ariz. at 541, 931 P.2d at 1051). *See also, State v. Schantz*, 98 Ariz. 200, 210-13, 403 P.2d 521 (1965) where the Arizona supreme court indicated that admitting evidence of mental illness to establish a defendant "did not have a state of mind which is an element of the offense" would force the jury into "releasing upon society many dangerous criminals who obviously should be placed under confinement." Under Arizona law, however, a defendant found GEI is committed to a secured mental health facility for the presumptive term (25 years in this case). *See*, ARS § 13-502(D); *State v. Ovind*, 186 Ariz. 475, 924 P.2d 479 (App. 1996). Moreover, consideration of such evidence might equally lead to a verdict of guilty of a less serious form of homicide with its attendant mandatory prison term. *See*, ARS §§ 13-1102 to 1104. Although the Arizona supreme court agreed that Model Penal Code § 4.02(1) was "desirable" it refused to adopt it "piecemeal." 98 Ariz. at 213.

used, to "negate[] the culpable mental state required for commission of . . . [an] offense."[30] That supposed justification for the rule brings it squarely into conflict with this Court's procedural Due Process holdings in *Chambers* and *Rock*.

Fisher v. United States, 328 U.S. 463 (1946), does not suggest otherwise. The sole issue considered by the *Fisher* majority was whether Fisher's trial judge was obliged to charge the jury affirmatively on Fisher's theory of the case, which was that his mental impairments negated the premeditation requisite for a first-degree murder conviction. The majority held that such affirmative instructions could be refused without offending the Constitution or exceeding the discretion allowed to the courts of the District of Columbia because Fisher's jury *was* instructed on premeditation in terms that permitted it to consider his evidence of intellectual and emotional deficiencies as bearing on that issue.[31] It was *not* forbidden to take those deficiencies into account in determining whether the prosecution had proved premeditation beyond a reasonable doubt. As the *Fisher* majority viewed the record, Julius Fisher in 1944 got exactly the consideration of his mental-illness evidence which Eric Clark is seeking in the

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[30] *See* ARS § 13-204(A): "Ignorance or a mistaken belief as to a matter of fact does not relieve a person of criminal liability unless: [¶] 1. It negates the culpable mental state required for commission of the offense. . . ."

[31] The jury in *Fisher* was instructed:

> "It is further contended that even if sane and responsible, there was no deliberate intent to kill, nor in fact any actual intent to kill. Therefore if not guilty by reasons of insanity, the defendant at most is guilty only of second degree murder or manslaughter, accord as you may find he acted with or without malice." 328 U.S. at 467, n. 3.

present case and which was denied below by the judge's application of the *Mott* exclusionary rule.

C. If Arizona's Evidentiary Prohibition is Considered Substantive, Foreclosing Eric From Proving that Mental Illness Made Him Incapable of Forming the Subjective *Mens Rea* Elements of First-Degree Murder Denied Him Substantive Due Process.

Straining to characterize the trial judge's application of *Mott* in Eric's case as a substantive "redefinition of the mental-state element of the offense" would change the constitutional analysis but would not produce a different result. The Court justifiably gives great deference to state legislative judgment in defining crimes and their elements when challenged as violations of substantive Due Process. *E.g.*, *Patterson v. New York*, 432 U.S. 197, 201-02 (1977); *Powell v. Texas*, 392 U.S. 514 (1968). But as it has recently observed in another context, deference does not by definition preclude relief.[32]

The Due Process Clause imposes vital although tolerant limits upon a State's power to inflict severe criminal sanctions in disregard of the fundamental Anglo-American principle that crime is "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand." *Morissette v. United States*, 342 U.S. 246, 251 (1952). When that principle is so blatantly affronted as to offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as

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[32] *Miller-El v. Dretke*, 125 S. Ct. 2317, 2325 (2005), quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

fundamental" (*Snyder v. Massachusetts*, 297 U.S. 91, 105 (1934)), the limits have been exceeded. *E.g.*, *Lambert v. California*, 355 U.S. 255 (1957); *Robinson v. California*, 370 U.S. 661 (1962).

It goes beyond these limits to make *Mott* into a rule punishing with equal and extreme severity two individuals – one, but only if when killing a police officer s/he knew the officer's identity and intended the officer's death; the other, because, in killing a police officer, s/he was suffering a mental derangement which occluded that knowledge and excluded that intent. It is one thing for a State to equate voluntary intoxication with the usual *mens rea* elements of a crime when an intoxicated person commits the *actus* as in *Montana v. Egelhoff*. That is consistent with a view deeply rooted in Anglo-American history that a person who kills or harms another through ignorance brought on "when he was drunk . . . [and] had no understanding and memory" shall "not be privileged thereby" because the "ignorance was occasioned by his own act and folly, and he might have avoided it."[33] But no such fault is involved in Eric Clark's affliction with chronic paranoid schizophrenia, nor "might [he] have avoided" the ignorance of Officer Moritz's identity that resulted from his involuntary medical condition.

It does not comport with the historical traditions that defined the fundamental principles of justice known to the

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[33] *Reniger v. Feogossa*, 1 Plow. 1, 19, 75 Eng. Rep. 1, 31 (Exch. Ch. 1551); and see, *e.g.*, 1 SIR MATTHEW HALE, PLEAS OF THE CROWN 32 (1800 ed.); 2 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 165 (1883 ed.) ("The reason why ordinary drunkenness is no excuse for crime is that the offender did wrong in getting drunk. . . .").

Framers of the Due Process Clause to equate insanity with the culpable mental states demanded of a sane person charged with first-degree murder. To the contrary, evidence of insanity had long been received to *negate* the *mens rea* elements of crimes. "Until the nineteenth century, criminal law doctrines of *mens rea* handled the entire problem of the insanity defense. Evidence of mental illness was admitted on the question of intent, and, as the infant discipline of psychiatry claimed an increased understanding of mental processes, such evidence grew in importance." Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477, 500 (1982).[34] The notion arose early in English criminal jurisprudence that culpability depended upon intention conjoined with action[35]; and this principle was linked from the outset with the recognition that insane persons should not be criminally punished because they lacked culpable intent. Bracton's thirteenth-century treatise *On the Laws and Customs of England* reflects the basis for this principle:

> " . . . [F]or a crime is not committed unless the will to harm be present. Misdeeds are distinguished by both will and by intention [and theft

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[34] *See also id.* at 501: "The pre-nineteenth century position was correct and clear: the psychiatrist could contribute useful evidentiary insights to the issues correctly defined by the common law of crime; that is, did the accused intend the prohibited harm?"

[35] The *mens rea* concept dates at least as far back as Plato's attempts to construct an ideal criminal code. Plato rejected the then prevailing view that differentiated crimes based upon whether they were voluntary or involuntary and proposed a gradation of crimes based upon levels of intent. Plato set forth a criminal code much like that of modern jurisprudence that permitted defenses based upon insanity and other forms of incapacity because they negated intent. A.E. Taylor, INTRODUCTION, IN THE LAWS OF PLATO XLIX-1, 253-73 (trans. 1934).

> is not committed without the thought of thieving]. And then there is what can be said about the child and the madman, for the one is protected by his innocence of design, the other by the misfortune of his deed. In misdeeds we look to the will and not the outcome. . . ."

(Translated and quoted in 1 NIGEL WALKER, CRIME AND INSANITY IN ENGLAND [THE HISTORICAL PERSPECTIVE] 26 (1968).[36]

Coke gave the concept classic expression in his dictum that "in criminal causes, as felonies, etc., the act and wrong of a madman shall not be imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea*." 2 Coke on Littleton, 247b, quoted in Sheldon Glueck, MENTAL DISORDER AND THE CRIMINAL LAW: A STUDY IN MEDICO-SOCIOLOGICAL JURISPRUDENCE 130 (1927). Although later commentators were to become preoccupied with developing and refining "arbitrary tests of irresponsibility, which are only concerned with *one element* or *one example* of the required total guilty intent" (*id.* at 131) – an enterprise that led to the distinct legal *doctrine* of insanity and thence to the *M'Naghten* formulation of that doctrine[37] – Coke

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[36] The bracketed phrase may be a later interpolation into Bracton's text. Walker makes the observation that Bracton, unlike his Roman-law sources, does not seem to be justifying leniency for the insane on the ground that madness is punishment enough, but rather is expounding the principle that "intention is all-important when it is a question of crime" (*id.* at 26) and "it is clear that for Bracton madmen as well as children were examples of offenders who lacked the intention necessary for guilt" (*id.* at 27).

[37] See 1 WALKER, *supra*, at 52-103. After the insanity doctrine took shape as a distinct defense with its own defining rules, defense lawyers appear to have less frequently proffered mental-health evidence as the basis for a reasonable doubt that their clients had entertained the *mens*

(Continued on following page)

himself reasoned from the basic premises of "the requirement of a 'guilty intent' as the basis of every crime and the fact that disease or defect of mind *negatives such intent.*" (*id.*) He "recognized the necessity of a guilty mind as the basis of every crime, and agreed with Bracton that an insane person can have no criminal intent." (*id.*).[38] This aspect of Coke's thinking "greatly influenced the law of his own day and later days."[39]

Justice Jackson described the transmission of this tradition from seventeenth and eighteenth century English

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rea elements of specific offenses. Two knowledgeable authorities on the subject have surmised that "[t]he most probable reason would seem to be that they have been distracted by the 'tests' of insanity, which purport to be comprehensive and to cover the subject." Henry Weihofen & Winfred Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L. J. 959, 964 (1947). In the late nineteenth century and the twentieth, increasing recourse to such evidence by defense attorneys produced a mixed reaction from the courts, some of which now reasoned that legislative codification of the special plea of "not guilty by reason of insanity" had preempted the field. See *id.* at 965-68; Edwin R. Keedy, *A Problem of First Degree Murder: Fisher v. United States*, 99 U. PA. L. REV. 267, 272-77 (1950); Travis D. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other Than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051 (1975).

[38] See also John Biggs, Jr., THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE 82-87 (1955); Henry Weihofen, MENTAL DISORDER AS A CRIMINAL DEFENSE 53-54 (1954); Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 CALIF. L. REV. 105, 110 (1923); Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 538-40 (1917).

[39] Biggs, *supra* note 38, at 86. As the Court has noted, Coke was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" *Payton v. New York*, 445 U.S. 573, 594 & n. 36 (1980), quoting A.E. Dick Howard, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 118-19 (1968).

jurisprudence to the colonies and then the States in *Morissette v. United States*, 342 U.S. 246, 252 (1952):

> "As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that . . . intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fraudulent intent,' 'wilfulness,' 'scienter,' to denote guilty knowledge, or 'mens rea,' to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes."

Arizona acted in this tradition when, in making some killings of police officers first-degree murders, it insisted that those murders be distinguished from murders of the second degree by a finding that the killer actually knew s/he was taking a police officer's life and intended that result. But the Arizona courts in Eric's case broke radically with the tradition when they held that he could be punished as though he had this knowledge and intent although

he may not in fact have had either. It amounts to punishing a paranoid schizophrenic for his actions committed under circumstances where a mentally unimpaired person would *not* be punished with the same severity. Such a redefinition of the mental-state element of first degree murder in the case of mentally ill individuals arbitrarily "lays an unequal hand on those who have committed intrinsically the same quality of offense" and outrages even "that large deference" which the Fourteenth Amendment owes to state substantive criminal-law experimentation. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

II. ARIZONA'S LAW OF CRIMINAL RESPONSIBILITY DEPARTS DRASTICALLY FROM THE DEEPLY ROOTED, FUNDAMENTALLY IMPORTANT, AND STILL PREVALENT STANDARD, REFLECTED BY *M'NAGHTEN* AND VIOLATES DUE PROCESS

Prior to 1993, Arizona's substantive test of exemption from criminal liability was whether "at the time of the criminal act, . . . [the accused] had '(1) [s]uch a defect of reason as not to know the nature and quality of the act, or (2) [i]f he did know [the nature and quality of the act], that he did not know he was doing what was wrong.'" *State v. Tamplin*, 195 Ariz. 246, 248, 986 P.2d 914, 916 (Ariz. Ct. App. 1999.) This two-part definition of insanity is deeply rooted in Anglo-American law. It is generally associated with the pronouncement of the English House of Lords in *M'Naghten's Case*, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843), though its origins long predate *M'Naghten*.

In 1993, the Arizona Legislature cut back this *M'Naghten* Rule by half. It enacted the current ARS § 13-502(A), under

which a person may be found "guilty except insane" only "if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." As the Arizona Court of Appeals has recognized, "[t]he new statute essentially abandoned the first prong of the *M'Naghten* test." *Tamplin*, 195 Ariz. at 248, 986 P.2d at 916. That is, in Arizona a defendant who establishes that the mental disease or defect from which s/he suffers is so severe that it prevented her/him from knowing the nature and quality of his or her actions is now ineligible for the insanity defense.

A. The Arizona Statute Is Contrary to the Most Deeply Rooted Historical Standard for Insanity.

It is axiomatic that the Due Process Clause of the Fourteenth Amendment prohibits States from altering their criminal laws in ways that "offend . . . [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977), quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958), and citing *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff*, 518 U.S. at 43; *accord*: *Medina v. California*, 505 U.S. 437, 446 (1992). The statutory change at issue here – Arizona's halving the *M'Naghten* standard for insanity – breaks radically with historical practices that have "deep roots in our common-law heritage" (*id.*, quoted in *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996)) and was virtually

unanimously followed at the time the Fifth and Fourteenth Amendment Due Process Clauses were adopted.

The insanity defense "has its roots in ancient Judaic, Christian and Roman Law." *Neely v. Newton*, 149 F.3d 1074, 1079 (10th Cir. 1998). Scholars of the subject have noted that recognition of the need to treat mentally ill persons differently in the context of criminal punishment is over 2,500 years old:

> "As early as the sixth century B.C., commentary on the Hebrew scriptures distinguished between the harmful acts traceable to fault and those that occur without fault. To those ancient scholars, the paradigm of the latter type of act was one committed by a child, who was seen as incapable of weighing the moral implications of personal behavior, even when willful; retarded and insane persons were likened to children."

AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 324 (1989). See also, Anthony Platt & Bernard L. Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. HIST. BEHAV. SCI. 335, 366 (1965). Beyond that, the more specific conviction that "the insane should not be punished for otherwise criminal acts has been firmly entrenched in the law for at least one thousand years." Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 10 (1982). Without doubt, the exculpatory force of insanity was "firmly established by the time the United States Constitution was adopted, and . . . has remained a fundamental part of American criminal law since Revolutionary days." Rudolph Joseph Gerber, THE INSANITY DEFENSE 83 (1984).

In England, the earliest articulations of insanity embraced the failure to know or understand one's actions. In 1603, for example, Lord Coke approved a definition, dating from Bracton in the thirteenth century that focused on whether the person knew the nature of his or her actions: "A madman is *one who does not know what he is doing*, who lacks in mind and reason and is not far removed from brutes." *Beverley's Case*, 76 Eng. Rep. 1118, 1121 (1603) (emphasis added). By the eighteenth century, English authorities took it to be a first principle that: "[t]he Guilt of offending against any Law whatsoever, necessarily supposing a willful disobedience, can never justly be imputed to those, who are either uncapable of understanding it, or of conforming themselves to it." 1 SERGEANT WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS 1 (5th ed. 1771); *see also*, *Rex v. Arnold*, 16 How. St. Tr. 695, 764 (1724) (the jury was instructed that in order to find the defendant insane, it must conclude that he is "totally deprive[d] of his understanding and memory, and *doth not know what he is doing*, no more than an infant, than a brute, or a wild beast") (emphasis added).

In short, from the very earliest periods, the prevailing English conception of insanity has included precisely what Arizona would now rule out: a failure to know the nature of one's actions. Although some features of the insanity defense have changed over time, "the essence of the defense, however formulated has been that *a defendant must have the mental capacity to know the nature of his act* and that it was wrong." *State v. Herrera*, 895 P.3d 359, 372 (Utah 1995) (Stewart, J., dissenting) (emphasis added). Knowledge of the nature of one's actions continued to be a

core ingredient of the concept of insanity when that already ancient concept found expression in its most famous and influential English formulation: the 1843 rule announced by the House of Lords in *M'Naghten's Case*. Under the *M'Naghten* Rule,

> "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843). As courts in this country have long recognized, the *M'Naghten* Rule "was in substance the test of legal insanity as it was known to the common law of England." *State v. Schantz*, 403 P.2d 521, 531-34 (Ariz. 1965); *see United States v. McBroom*, 124 F.3d 533, 544 (3d Cir. 1997) (tracing the *M'Naghten* Rule to "the modern dawn of common law recognition of insanity as a defense to criminal charges"); *United States v. Garcia*, 94 F.3d 57, 61 n. 3 (2d Cir. 1996) ("The earliest formulation of the insanity defense had its origins in *M'Naghten's* case.").[40]

The *M'Naghten* Rule crossed the Atlantic with the common law of England. It rapidly became the basis for

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[40] Courts occasionally refer colloquially to the *M'Naghten* Rule as the "right-wrong test." In context, however, it is clear that this shorthand refers to the entire *M'Naghten* Rule as originally articulated, not just the second part regarding knowledge of the wrongness of the act. *See Garcia*, 94 F.3d at 61 n. 3 (quoting the *M'Naghten* Rule in its entirety and then referring to it as "the right-wrong test").

the test of insanity in every U.S. jurisdiction except New Hampshire. See Weihofen, *supra* note 38, at 68-69. During the succeeding decades some jurisdictions supplemented *M'Naghten* with more lenient standards such as the "irresistible impulse" test, but *M'Naghten* continued to describe the essential minimum standard for the vast majority of jurisdictions. Thus, by drastically narrowing its definition of insanity to exclude defendants who did not know the nature and quality of their actions at the time of the offense charged, Arizona has departed from the canonical standard of insanity – a standard that was well established and accepted at the time the Due Process Clauses were conceived, written, and ratified.

B. The Vast Majority of States Continue to Employ a Standard at Least as Broad as the *M'Naghten* Rule.

Not only is the *M'Naghten* Rule deeply rooted in our history and experience, it remains the most common standard for insanity among the States today. Many other States employ standards that are even more broadly exculpatory than *M'Naghten*. Through one or the other of these practices, the overwhelming majority of American jurisdictions continue to accommodate the deeply rooted conception of insanity reflected in the *M'Naghten* test.

Twenty States, as well as the federal government, retain the *M'Naghten* Rule in its original form or with slight modifications that preserve the key provision at issue here.[41] An additional seventeen States plus the

[41] See Ala. Code § 13A-3-1; Alaska Stat. § 12.47.010; Cal. Penal Code § 25; Fla. Stat. Ann. § 775.027; Iowa Code Ann. § 701.4; Minn.

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District of Columbia have adopted some version of the standard proposed by the American Law Institute ("ALI"), which is broader than and subsumes the *M'Naghten* Rule.[42] The ALI standard provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." Model Penal Code § 4.01 (P.O.D. 1962). Some ALI jurisdictions have not retained the volitional component of the test (*i.e.*, the language regarding "conform[ing] his conduct to the requirements of the law"), but most have kept it. All ALI jurisdictions retain the cognitive component referring to a person's lack of "substantial capacity to appreciate the criminality of his conduct." That part of the ALI test alone expands on the *M'Naghten* Rule (by requiring appreciation rather than mere knowledge) while retaining a central concern not just for whether the defendant could tell right from wrong, but

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Stat. Ann. § 611.026; *Roundtree v. State*, 568 So.2d 1173 (Miss. 1990); Mo. Ann. Stat. § 552.030; *State v. Hurst*, 594 N.W.2d 303 (Neb. Ct. App. 1999); *Finger v. State*, 27 P.3d 66 (Nev. 2001); N.J. Stat. Ann. § 2C:4-1; *State v. White*, 270 P.2d 727 (N.M. 1954); N.Y. Penal Law § 40.15; *State v. Staten*, 616 S.E.2d 650 (N.C. Ct. App. 2005); N.D. Cent. Code § 12.1-04.1-01; Okla Stat. tit. 21, § 152(4); 18 Pa. Cons. Stat. § 315(b); Tenn. Code Ann. § 39-11-501; *Bennett v. Commonwealth*, 511 S.E.2d 439 (Va. Ct. App. 1999); Wash. Rev. Code Ann. § 9A.12.010; 18 U.S.C. § 17.

[42] See Ark. Code Ann. § 5-2-312; Conn. Gen. Stat. Ann. § 53a-13; *Bethea v. United States*, 365 A.2d 64 (D.C. 1976); Haw. Rev. Stat. Ann. § 704-400; 720 Ill. Comp. Stat. Ann. 5/6-2(a); Ind. Code Ann. § 35-41-3-6(a); Ky. Rev. Stat. Ann. § 504.020(1); Me. Rev. Stat. Ann. tit. 17-A, § 39; Md. Code Ann., Crim. Proc. § 3-109; *Commonwealth v. McHoul*, 226 N.E.2d 556 (Mass. 1967); Mich. Comp. Laws Ann. § 768.21a(1); Or. Rev. Stat. § 161.295; *State v. Johnson*, 399 A.2d 469 (R.I. 1979); Vt. Stat. Ann. tit. 13, 4801; *State v. Grimm*, 195 S.E.2d 637 (W.V. 1973); Wis. Stat. Ann. § 971.15; Wyo. Stat. Ann. § 7-11-305(b).

whether s/he understood the import of his or her actions. See, Rita J. Simon & David E. Aaronson, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA 39 (1988) (noting that "the ALI test further expanded the *M'Naghten* rule by requiring *a failure to apprehend the significance of one's actions* in some deeper sense involving 'affect' or 'emotional appreciation,' rather than some surface understanding or verbalization of knowledge") (emphasis added). One final State, New Hampshire, employs the product test, under which the defendant is not guilty by reason of insanity if his or her crime "was the offspring or product of mental disease." *State v. Pike*, 49 N.H. 399, 408 (1869). This test, too, subsumes *M'Naghten* within it. *See Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954) (calling the product test a "broader test" than *M'Naghten*).

All together, at least thirty-eight States, the District of Columbia, and the federal government employ insanity standards under which those satisfying either part of the *M'Naghten* Rule qualify as legally insane. This pervasive practice confirms the fundamental place that the *M'Naghten* Rule continues to occupy in American criminal law, and further compels the conclusion that States may not go below the *M'Naghten* standard without violating Due Process. See *Cooper*, 517 U.S. at 359-62.

C. Ample Precedent Supports the Conclusion that States May Not Adopt an Insanity Test Narrower than *M'Naghten's* Without Violating Due Process.

Although this Court has never squarely addressed the issue,[43] a number of lower courts have held that Due Process prohibits States from cutting back on the *M'Naghten* Rule. In *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910), the Washington Supreme Court held that a state statute abolishing the *M'Naghten* Rule violated the Washington Constitution.[44] In so concluding, the court surveyed the law of insanity more broadly, noting the historic "'rule of law in every civilized country that no insane man can be guilty of a crime, and hence cannot be punished for what would otherwise be a crime.'" 60 Wash. at 114, 110 P. at 1022. Relying, in part on legal authorities interpreting the United States Constitution, and using the precise sort of historically sensitive analysis that this Court has employed when resolving Due Process issues, the *Strasburg* Court held that abolishing the *M'Naghten* Rule violated Due Process. See *id.*

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[43] The Court has, however, embraced *M'Naghten* as the appropriate "test to be applied to the general defense of insanity." *Hotema v. United States*, 186 U.S. 413, 420 (1902) (describing the test as whether the "defendant knew the nature and quality of his act when he committed it, and that it was wrong and a violation of the law of the land, for which he would be punished"). *See also, Davis v. United States*, 186 U.S. 373, 378 (1897) (defining an insane person as being "incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing.")

[44] The statute provided that "[i]t shall be no defense to a person charged with the commission of a crime that at the time of its commission he was unable, by reason of his insanity, idiocy or imbecility, to comprehend the motive and quality of the act committed, or to understand that it was wrong." 110 P. at 1021.

The Mississippi Supreme Court reached a similar conclusion in *Sinclair v. State*, 161 Miss. 142, 132 So. 581, 582 (1931) when it struck down on state due process grounds a statute that provided that "the insanity of the defendant at the time of the commission of the crime shall not be a defense against indictments for murder." In a concurring opinion, Justice Ethridge stressed that "it is certainly shocking and inhuman to punish a person for an act *when he does not have the capacity to know the act* or to judge of its consequences." *Id.* at 584 (emphasis added).

More recently, in *Finger v. State*, 117 Nev. 548, 27 P.3d 66 (2001), the Nevada Supreme Court, after exhaustively tracing the history of the insanity defense in American law, held that "legal insanity is a well-established and fundamental principle of the law of the United States," and "is therefore protected by the Due Process Clauses of both the United States and Nevada Constitutions." 117 Nev. at 575, 27 P.3d at 84. The insanity standard to which the court referred was the *M'Naghten* Rule. 117 Nev. at 576-578, 27 P.3d at 84-86.

Put simply, the *M'Naghten* Rule is a fundamental principle of law, and the Constitution secures for eligible defendants the right to put on an insanity defense under a standard at least as broad as *M'Naghten*. Other courts agree. *United States v. Greene*, 489 F.2d 1145, 1172 n. 69 (D.C. Cir. 1974) (noting that "the insanity defense . . . appears to be constitutionally required"); *Ingles v. People*, 92 Colo. 518, 522, 22 P.2d 1109, 1111 (Colo. 1933) ("[A] statute providing that insanity shall be no defense to a criminal charge would be unconstitutional.").

This Court's precedents are not to the contrary. There are two key points to note about its cases in this area.

First, the issue in most of the cases was the constitutionality of the burden of proof used to adjudicate the insanity defense, rather than anything to do with the substantive contours of the defense.[45] Second, in cases that do refer to the appropriate substantive standard for insanity, the question is invariably whether the Constitution should be construed to require a *broader* definition of insanity than the one established by *M'Naghten*. That is, the cases involved arguments that the *M'Naghten* Rule is constitutionally *insufficient*, not, as here, the more modest claim that *M'Naghten* ought to be preserved as a constitutional minimum.[46]

In *Leland v. Oregon*, 343 U.S. 790 (1952), for example, the Court devoted the bulk of its attention to a claim that Oregon had violated Due Process by placing upon the defendant the burden of proving insanity beyond a reasonable doubt. *Id.* at 799. It then disposed of the defendant's contention that the Constitution compelled adoption of the more permissive "irresistible impulse" test for insanity, rather than Oregon's *M'Naghten* Rule.

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[45] *E.g.*, *Rivera v. Delaware*, 429 U.S. 877 (1976). Analogously, in *Patterson v. New York*, 432 U.S. 197 (1977), the Court held that Due Process was not offended by a New York law that placed the burden of proving the affirmative defense of extreme emotional disturbance upon the defendant. In that context the Court stated that "it is normally within the power of the State to regulate *procedures* under which its laws are carried out, including the burden of producing evidence and the burden of persuasion." *Id.* at 201 (emphasis added). *Accord*, *Martin v. Ohio*, 480 U.S. 228, 231-32 (1987).

[46] To reject the former sort of claim is a far cry from rejecting the latter. As Justice Scalia has written, the purpose of the Due Process Clause "is to prevent future generations from lightly casting aside important traditional values – not to enable this Court to invent new ones." *Michael H. v. Gerald D.*, 391 U.S. 110, 122 n. 2 (1989).

> "The science of psychiatry has made tremendous strides since . . . [the] test was laid down in *M'Naghten's Case*, but the progress of science has not reached a point where its learning would compel us to require the states to *eliminate* the right and wrong test from their criminal law. Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement among those who have studied it. In these circumstances it is clear that adoption of the irresistible impulse test is not 'implicit in the concept of ordered liberty.'" (emphasis added.)

Id. at 800-01 (footnotes omitted). The Court thus concluded that, in light of the scientific and policy disagreements over the relative merits of the *M'Naghten* and irresistible impulse tests, it would be inappropriate to require the States to adopt a volitional add-on to the time-honored *M'Naghten* Rule as a matter of constitutional law. But that conclusion did not imply that there are no constitutional limits to the States' power to erode the traditional boundaries between the spheres of culpability and madness, or that *M'Naghten* does not stand as a bastion of those boundaries. If anything, the Court's respect for *M'Naghten* implicitly suggested its fundamental character.

Similarly in *Powell v. Texas*, 392 U.S. 514 (1968), the Court considered the constitutionality of a statute making it a crime to be intoxicated in a public place. Powell attacked the statute under *Robinson v. California*, 370 U.S. 660 (1962), which had struck down a California law making it criminal to have a drug addiction. He argued that the Texas statute effectively created a similar status

crime because "chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts." *Powell*, 392 U.S. at 535. At bottom, this amounted to an argument that, as a matter of irrefutable fact, "chronic alcoholics suffer from an irresistible impulse to drink and [that they] are therefore insane" as a matter of federal constitutional law. Robitscher & Haynes, *supra*, at 58. *See Powell*, 392 U.S. at 544 (Justice Black, concurring) noting that, were the Court to accept Powell's argument, it "would be . . . require[d] [to] recogni[ze] . . . 'irresistible impulse' as a complete defense to any crime," even though that was "probably contrary to present law in most American jurisdictions"). It was in that context that the Court declined the invitation to "defin[e] . . . some sort of insanity test in constitutional terms" (*id.* at 536) as an exercise that would have offended "[t]raditional common-law concepts of personal accountability" (*id.* at 536) – "casting aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds" (*id.* at 535-36) – as well as overriding "essential considerations of federalism" (*id.* at 535). So *Powell*, like *Leland* is far from categorically rejecting the idea of a minimum constitutional standard for insanity, particularly one that is firmly *grounded in* those very common-law traditions.[47]

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[47] Similarly, *Medina v. California*, 505 U.S. 437 (1992), cannot be understood as speaking to the issue. In *Medina* the Court found that Due Process was not offended by a State's imposing on criminal defendants the burden of proving (by a preponderance of the evidence) their incompetence to stand trial. The ruling was explicitly predicated

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In sum, although this Court has not yet addressed the question whether the States can constitutionally abrogate the insanity defense or confine it to a compass narrower than the traditional *M'Naghten* Rule,[48] the historicity and continuing pervasiveness of the core elements of *M'Naghten* bear all of the conventional indicia of a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" *Patterson*, 432 U.S. at 201-02. And one of those core elements is the immemorial principle that an individual cannot be held culpable for acts when s/he does not even know what s/he is doing. In flouting that principle, Arizona violates Due Process.

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on a finding that "there is no settled [historical] tradition on the proper allocation of the burden of proof in a proceeding to determine competence." *Id.* at 446. In declining to create a constitutional burden-of-proof rule with no foundation in tradition, the Court noted in passing that "we have not said that the Constitution requires the States to recognize the insanity defense." *Id.* at 449 (citing *Powell*, 329 U.S. at 536-37). That entirely accurate statement carefully avoids deciding the issue which it describes as undecided.

[48] The Supreme Courts of Idaho, Montana and Utah have concluded that the Constitution permits States to abolish the insanity defense. *See, e.g., State v. Herrera*, 895 P.2d 359 (Utah 1995); *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990); *State v. Korell*, 213 Mont. 316, 690 P.2d 992 (Mont. 1984). Each of those decisions incorrectly seeks support for that conclusion in this Court's precedents which we have discussed above and shown to leave the issue open. And the lower-court decisions themselves sustain the abolition of the traditional insanity defense – the distinct *legal* doctrine exempting a defendant from criminal liability on the ground of a qualifying mental illness – only when the defendant's right to show his or her mental illness as a *factual* basis for contesting the prosecution's proof of the *mens rea* elements of the charged offenses is preserved. That is, of course, not the case in Arizona. See Point I *supra* and Point III *infra*.

D. The Suggestion of the Court of Appeals that Arizona's Halving of the *M'Naghten* Standard Made No Difference in Eric's Case Disregards the Record.

After explaining as a matter of legal analysis why Arizona's "eliminating the first prong of the *M'Naghten* test . . . [does not constitute] a violation of due process," the Court of Appeals below added that the cutback was of no consequence to Eric because "[i]t is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong'." (JA 350) This reasoning starts from the fallacious premise that the line of thinking of a schizophrenic can be predicted by normal logic.

The record flatly refutes that premise. The defense psychiatric expert testified that schizophrenia is "characterized by a variety of forms of distorted thinking . . . , a disturbance in logic; their thinking really does not make a lot of sense. It's not connected." (RT 8/22/03 at 21/JA 18.) "It's not based on logic, it's not based on the shared understanding we have of the world. It's their own idiosyncratic logic." (Id. at 27/JA 22-23; see also id. at 22, 28 JA 18-19, 23-24.) The prosecution expert did not contest this but agreed that paranoid schizophrenia is characterized by distorted thinking and contradictory logic. (RT 8/26/03 at 91, 96-97/JA 181-82, 185-86.) This record contains both expert testimony that Eric "really had a tremendous amount of difficulty perceiving reality as you and I see it" (RT 8/22/03 at 48/JA 39), and descriptions of episodes in which, after engaging in bizarre or violent behavior, Eric appeared immediately afterwards to not know what he had just done or at times know whether it was wrong. (RT 8/19/03 at 99; RT 8/20/03 at 135; RT 8/12/03 at 49-53; RT 8/21/03 at 72-73).

That unawareness of the nature of his acts could coexist in Eric's psychotic mind with knowledge of the wrongness of killing is no less plausible than other insane contradictions he unquestionably harbored. For example as the prosecutor elicited on cross examination of the defense expert psychiatrist:

> "Q. He also told you that his family . . . were his best friends?
>
> A. Yes.
>
> Q. He also told you his parents may be aliens?
>
> A. Yes.
>
> Q. But, in spite of that, they were still his best friends?
>
> A. That kind of conflictual sort of logic is . . . very common with schizophrenics, you know, where two seemingly opposing . . . opposite sorts of things can . . . be present in the person's mind but it's part of their whole irrationality."

(RT 8/22/03 at 73/JA 60-61.)

III. ASSUMING DUE PROCESS PERMITS A STATE *EITHER* TO HALVE THE INSANITY DEFENSE *OR* TO ABROGATE AN INSANE DEFENDANT'S *MENS REA* DEFENSE, ARIZONA VIOLATED THE CONSTITUTION WHEN IT DID *BOTH*

In prosecuting Eric Clark, Arizona simultaneously denied him the benefit of half of the traditional Anglo-American standard for insanity (Part II, *supra*) and precluded the trier's consideration of Eric's severe mental illness as a basis for factual doubt that the prosecution

had proved the mental elements of the charge of first degree murder. (Part I, *supra*.) This kind of hamstringing of both legs of a mentally impaired defendant's traditional means for obtaining consideration of his/her involuntary mental impairments is exceedingly rare among American jurisdictions. Only four States other than Arizona – Delaware, Georgia, Louisiana, and Ohio – both rule out the first prong of the *M'Naghten* insanity defense and prohibit the use of mental-illness evidence to challenge the prosecution's proof of *mens rea*.[49] Every other State in the Union, as well as the District of Columbia and the federal government, allows a mentally ill criminal defendant at least one, if not both, of these procedures for defending against the imputation of guilt for actions committed without knowing what s/he was doing.

Even those courts that would grant the States the greatest leeway to alter the traditional insanity defense acknowledge that abridging both insanity and the right to present psychiatric evidence to rebut the prosecution's proof of *mens rea* elements would raise serious constitutional difficulties. In upholding the total abolition of the

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[49] Del. Code Ann. tit. 11, § 401(a) and *Bates v. State*, 386 A.2d 1139, 1144 (Del. 1978) (Delaware also, however, permits a finding of GEI for defendants who as a result of a psychiatric disorder have "insufficient willpower to choose whether [to] do the act or refrain from doing it." (§ 401(b)); Ga. Code Ann. § 16-3-2 and *State v. Ball*, 310 S.E.2d 516 (Ga. 1984) (Georgia also, however, provides for the defense of delusional compulsion and permits a finding of GEI if a defendant, as a result of mental illness has "significantly impair[ed] judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." Ga. Code Ann. § 16-3-3; § 17-7-131(a)(2), (c)(2)); La. Rev. Stat. Ann. § 14:14 and *State v. Jones*, 359 So.2d 95, 98 (La. 1978); Ohio Rev. Code Ann. § 2901.01(A)(14) and *State v. Wilcox*, 70 Ohio St. 2d 182, 436 N.E.2d 523 (Ohio 1982).

insanity defense in Idaho,[50] the Idaho Supreme Court noted that "[t]hree states, Idaho, Montana, and Utah, have legislatively chosen to reject mental condition as a separate specific defense to a criminal charge. The statutes in these three states, however, expressly permit evidence of mental illness or disability to be presented at trial, not in support of an independent insanity defense, but rather in order to permit the accused to rebut the state's evidence offered to prove that the defendant had the requisite criminal intent or *mens rea* required . . . to commit the crime charged." *State v. Searcy*, 118 Idaho 632, 635, 798 P.2d 914, 917 (1990). The Utah high court took care to note the same point and to explain the role that mental-illness evidence can still play in trials of criminal guilt or innocence. See *State v. Herrera*, 895 P.2d 359, 364 (Utah 1995).

In Arizona, that role has been foreclosed for defendants whose mental illness prevented them from knowing what they were doing. Beyond the grave constitutional flaws in Arizona's preclusion of defense evidence offered to contest *mens rea* on the one hand and severe curtailment of the *M'Naghten* Rule on the other, the application of both these impediments together deny a criminal accused "a meaningful opportunity to present a complete defense" (*Crane*, 476 U.S. at 690) and make an aimless mockery of the Due Process model of a fair trial

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[50] erroneously, in our view.

CONCLUSION

Eric Clark's conviction was obtained in violation of Due Process and should be reversed.

RESPECTFULLY SUBMITTED this 30th day of January, 2006.

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